SUPREME COURT OF NOVA SCOTIA

Citation: Brogan v. RBC Dominion Securities Inc., 2009 NSSC 164

Date: 20090519
Docket: Syd. No. 28135
Registry: Sydney

Between:

Thomas Brogan, Romad Developments Ltd.,
Tom Brogan & Sons Construction Ltd., Derrick J. Kimball,
Nash T. Brogan and Jocelyn Brogan

Plaintiff/Respondent

v.

RBC Dominion Securities Inc.

Defendant/Applicant

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	April 7, 2009, in Halifax, Nova Scotia
Counsel:	William P. Burchell, Esq. for the plaintiff/respondent Alan V. Parish, Q.C. with Jason Cooke, Esq. defendant/applicant

By the Court:

[1] This is a motion to strike portions of an affidavit. The defendant (and applicant) has applied for a stay of proceedings for want of prosecution of the main proceeding, pursuant to Rule 28.13 of the *Civil Procedure Rules 1972* and the Court's inherent jurisdiction to control its process. This application is scheduled to be heard on May 29, 2009. In response to the defendant's application, the plaintiffs (and respondents) filed an affidavit of the plaintiff Derrick J. Kimball. In advance of the hearing of the main application, the defendant seeks to have two paragraphs struck from Mr. Kimball's affidavit. This decision deals only with the motion to strike portions of the affidavit, brought pursuant to Rule 39.04 of the current *Civil Procedure Rules*.

[2] The Statement of Claim, filed on September 21, 2000, alleges that the plaintiffs maintained investment accounts with the defendant, RBC Dominion, and that the defendant advised them to purchase two gold mining stocks that resulted in significant losses to the plaintiffs. The plaintiffs claim on the basis of breach of fiduciary duty, alleging that the defendant knew of insider trading and violation of securities laws by the two companies and their officers. They also alleged that the defendant was vicariously liable for the breaches of duty of its former employee,

Patrick O'Neill. The plaintiffs also allege breach of contract and negligent advice. The defendant denied the allegations in its defence, filed February 17, 2004, and counterclaimed against the plaintiff Nash T. Brogan on the basis of misrepresentation. Mr. Brogan filed a defence to the counterclaim on March 22, 2004. In the affidavit filed in support of the defendant's application, the defendant sets out the history of the proceedings and describes the prejudice that will allegedly ensue if the proceeding is allowed to continue. The applicant requests that paragraphs 10 and 12 of Mr. Kimball's affidavit be struck. The Notice of Motion also referred to paragraph 7, but the applicant indicates in its written submissions that it does not request that paragraph 7 be struck.

[3] The defendants bring this motion to strike part of Mr. Kimball's affidavit pursuant to Rule 39.04 of the *Civil Procedure Rules*, on the basis that the impugned paragraphs are irrelevant, argument, plea or inadmissible hearsay. Rule 39.04 provides as follows:

> 39.04 (1) the judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike part of an affidavit containing either of the following:

> (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
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> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.

[4] The applicant only requests that two specific paragraphs of the affidavit be struck. I am required by Rule 39.04(2) to strike any part of the affidavit containing "information that is not admissible, such as an irrelevant statement or a submission or plea" or "information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information."

[5] The leading case on affidavits in this province is *Waverley (Village Commissioners) et al. v. Nova Scotia (Minister of Municipal Affairs) et al.* (1993), 123 N.S.R. (2d) 46 (SC), in which Davison J. of this court considered precisely what should be contained in an affidavit. On an application for judicial review to

set aside an order of the Minister of Municipal Affairs, the applicants filed affidavits that the respondents sought to strike on the basis that they were irrelevant, frivolous and vexatious. Justice Davison considered the law relating to the content of affidavits, and said, at para. 20:

> It would be helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
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> 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
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> 2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
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> 3. Affidavits used in applications may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised".
>
> 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a second source and preferably the original source.
>
> 5. The affidavit must state that the affiant believes the information received from the source.

[6] Justice Davison found it necessary to strike the affidavits, which he found to be “replete with expressions of opinions which touch on and relate to a history of the project, environmental factors, traffic issues and various legal issues.” In addition, most of the affidavits gave “no indication whether the information is based on personal knowledge or information and belief. Some refer to matters based on information but the source of the information is not stipulated nor is the belief of the affiants stipulated in the affidavit” (para. 10). Justice Davison’s decision was affirmed by the Court of Appeal: *Waverley (Village Commissioners) et al. v. Kerr et al.* (1994), 129 N.S.R. (2d) 298 (CA). An application for leave to appeal to the Supreme Court of Canada was dismissed: [1994] S.C.C.A. No 411.

[7] The adequacy of affidavits was addressed again in *Wall v. Horn Abbot Ltd.*, [1999] N.S.J. No 124 (C.A.), an application to strike an affidavit under Rule 38.02(1) of the *Civil Procedure Rules 1972*. Cromwell J.A. (as he then was) held addressed the use of hearsay and information and belief. He said, at paras. 30 and 38:

> 30 ... The purpose of the Rule is to allow the deponent to set out his belief as to matters of fact relevant to the proceedings, not to offer commentary on his assessment of the credibility of others. What the affidavit is to contain is the statement of deponents' belief of relevant facts with the sources and grounds for the belief stated. See *Waverley* ...; see also *Watts Estate v. Contact Canada Tourism Services Ltd.* (1998), 212 A.R. 207 (C.A.) at para 27 -28. It is not proper for an affidavit to set out long recitations, much of marginal relevance, of

> conversations with others and then say which parts of them the deponent believes. In the absence of explanation why some parts of the recounted statements are believed and others are not, the affidavit does not comply with the Rule....
>
> ***
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> 38 Hearsay evidence is admissible on applications under Rule 38 if the deponent believes it to be true and sets out the basis of that belief. As discussed earlier, this is not done consistently in the affidavit. Moreover, this affidavit was directed squarely at the merits of the plaintiff's case. Hearsay, let alone hearsay upon hearsay, should be given little if any weight on that issue. The Rule relaxing the admissibility of evidence on applications was designed to facilitate Chambers applications, not to deny the normal procedural protections when the merits of a claim are being decided.

[8] In *Balders Estate v Nova Scotia (Registrar of Probate)*, [1999] N.S.J. No. 182, Saunders J. (as he then was) considered the contents of an affidavit of a solicitor who was not the solicitor of record, but who was a partner of the former solicitor of record and who was a plaintiff in the action. He said, at para. 12, that there was nothing to prohibit placing the “expert opinion” of the lawyer before the Court in the form of an affidavit, the lawyer having “deposed to matters either within their personal knowledge, or identified and adopted as the foundation for their ‘information and belief’” (para. 12).

[9] In finding that the affidavits before him were not objectionable, Justice Saunders said, at paras. 18-20:

> 18 Unlike trials, affidavits filed in support of an application may contain hearsay provided, as Mr. Endres put it in argument, such hearsay is put forward

on a principled basis. This was so long before the common law rules with respect to hearsay evidence were so dramatically reformed by such decisions as *Khan*. Nova Scotia Civil Procedure Rule 38.02 provides:

> "(1) an Affidavit used on an application may contain statements as to the belief of the deponent with the sources and grounds thereof.
>
> (2) Unless the court otherwise orders, an affidavit used on a trial shall contain only such facts as the deponent is able of his own knowledge to prove."

19 Thus in a matter such as this, begun by originating notice (application inter partes) the parties are entitled to file affidavit evidence going beyond the deponent's personal knowledge. One is able to augment the deponent's own personal knowledge with "hearsay" admitted on a principled basis, that is in a fashion that will announce and vouch for its necessity and reliability. That is why C.P.R. 38.02(1) compels the disclosure of:

> "... the sources and grounds thereof"

and why Mr. Justice Davison explained in *Waverley, supra* that:

> "4. (t)he information as to the source must be sufficient to permit the court to conclude that the information comes from a second source and preferably the original source.
>
> 5. (t)he affidavit must state that the affiant believes the information received from the source."

20 There is nothing objectionable within Mr. Matthews' affidavit, nor in the manner in which he has expressed it. He begins by identifying himself as the Proctor of the estate of the late Nora Langton Balders. In that capacity he has personal knowledge about all of the subjects to which he swears unless the factual assertion is prefaced by the specific caveat that it is based upon information and belief. In those instances Mr. Matthews properly identifies his sources, either by reference to individuals - for example John W. Arnold, Q.C. whose affidavit he has read; the two co-executors from whom he obtains instructions; or the correspondence and other attachments appended as exhibits to his affidavit.

[10] Notwithstanding that Mr. Kimball is a lawyer, the present affidavit does not come before the court as one supporting an expert legal opinion. Rather, he is offering evidence of facts in the character of a party to the proceeding.

[11] Another point raised by the applicant is that an affidavit filed on an interlocutory application (or, presumably, a motion under the current rules) must relate to the facts and issues arising on the application or motion and not to the main proceeding. In *Federal Business Development Bank v. Silver Spoon Desserts Enterprises Ltd.*, [2000] N.S.J. No. 72 (S.C.), the Court struck many paragraphs as irrelevant to the issues on the application, even if relevant in the broader context of the litigation as a whole. Hood J. stated, at para. 12:

> In his November 8, 1999 supplementary brief, Mr. Mitchell refers to Rule 38.11 which provides that "the court may order any matter, that is ... irrelevant ... to be struck out of an affidavit". He then refers to the test of relevancy set out in [Sopinka et al.] *The Law of Evidence in Canada*, Toronto, 2nd ed. at s. 2.35 at p. 24:
>
> > 2.35 A traditionally accepted definition of relevance is that in Sir J.F. Stephen's *A Digest of the Law of Evidence*, where it is defined to mean:
> >
> > ... any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

> Pratte J. in *R. v. Cloutier*, [1979] 2 S.C.R. 709 accepted a definition from an early edition of *Cross on Evidence*:
>
> For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

[12] Hood J. went on to say, at paras. 18-19:

> 18 With respect to the big affidavit, certain portions do not meet the test for relevance articulated in the Sopinka text. They do not relate to the facts in issue on this application. Some may be relevant in the broader context of the litigation as a whole. That is not a matter for me but for the trial judge.
>
> 19 Portions of the big affidavit do not relate to the question of relief from the implied undertaking nor, if relief is granted, to the issue of whether this is evidence that would cause me to set aside or vary the deficiency judgment. Nor do they relate to the question of a costs penalty for non-closure.

[13] The above represents, in my view, the rationale for admitting affidavit evidence on the former application or the current motion. I do not believe that whether it is a proceeding under the former *Civil Procedure Rules 1972* or under the current *Civil Procedure Rules* should cause the court to come to any different conclusion. I note that I have considered all of the cases cited by the parties, including *Atlantic Canada Opportunities Agency v. Ferme D'Acadie*, 2008 NSSC

334, and *Chopik v. Mitsubishi Paper Mills Ltd.*, 2002 CarswellOnt 2336 (Ont. S.C.J.).

[14] In this case, the issue on the main application is dismissal for want of prosecution. As such, affidavits filed on the application must be relevant to that issue. The analysis for dismissal for want of prosecution is set out in *Clarke v. Sherman*, 2002 NSCA 64, [2002] N.S.J. No. 238, at para.7:

> 7 ... [I]n *Hurley v. Co-op General Ins. Co.* (1998), 169 N.S.R. (2d) 22, Flinn, J.A., after noting Justice Cooper's two-fold test in [*Martell v. McAlpine (Robert) Ltd.* (1978), 25 N.S.R. (2d) 540 (N.S.S.C., App. Div.)] went on to approve the reasons of Lord Justice Salmon in *Allen v. McAlpine (Sir Alfred) & Sons Ltd., et al.* by observing:
>
> > 30 These principles are set out in helpful detail by Lord Justice Salmon in *Allen v. Sir Alfred McAlpine & Sons Ltd. et al*, [1968] 1 All E.R. 543, at p. 561, and cited with approved by Justice Hallett in *Moir v. Landry* (1991), 104 N.S.R. (2d) 281 (N.S.C.A.) at p. 282:
> >
> > > A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
> > >
> > > (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.

> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the time.
>
> If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. If he is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault. If, however, the delay is entirely due to the negligence of the plaintiff's solicitor and the plaintiff himself is blameless, it might be unjust to deprive him of the chance of recovering the damages to which he could otherwise be entitled.
>
> 8 Thus, to summarize, in order to succeed the onus is upon a defendant to show: first, that the plaintiff is to blame for inordinate delay; second, that the inordinate delay is inexcusable; and third, that the defendant is likely to be seriously prejudiced on account of the plaintiff's inordinate and inexcusable delay. If the defendant is successful in satisfying these three requirements, the court, before granting the application must, in exercising its discretion, go on to take into consideration the plaintiff's own position and strike a balance - in other words, do justice - between the parties.

[15] Relevance on this motion will be determined in accordance with the elements of dismissal for want of prosecution. It must thus relate to the length of the delay, any credible excuse for the delay, any serious prejudice to the defendant or the balancing analysis, taking into consideration the degree of blame attributable to the plaintiffs themselves for the delay.

[16] In his affidavit, Mr. Kimball states that he is one of the plaintiffs in the action and has personal knowledge of the matters deposed to, except where stated to be based on information and belief in which case he believed them to be true. He states that the matter relates to events in 1996 and 1997, and that notice of the claim was provided to the defendant by Howard Crosby Q.C. in 1998. He goes on to recount that the proceeding was commenced in September 2000. A demand for particulars was filed on October 10, 2000 and a response to the demand was filed on December 8, 2003. The plaintiff's list of documents was filed on December 29, 2003. The defence and counterclaim were filed on February 17, 2004, with a defence to the counterclaim filed on March 22, 2004. An application was filed by the plaintiff to compel the defendant to file its list of documents on March 6, 2006. The defendant's list of documents was filed May 30, 2006.

[17] Mr. Kimball averred that the claim was under the care of Mr. Crosby who passed away on December 12, 2003. In October 2004, the defendant's solicitor suggested that Heidi Foshay Kimball withdraw as solicitor of record. The plaintiffs subsequently retained Ontario counsel in November 2004. According to Mr. Kimball, "that retainer ended in November 2007 as it became apparent that it was

logistically difficult to move the case along with counsel in Ontario." The plaintiffs then retained William Burchell of Sydney Mines, who filed a Notice of Change of Solicitor and a Notice of Intention to Proceed. Mr. Kimball states that in 2008 counsel for the defendants was advised that the plaintiffs were prepared to proceed to discoveries, that a without prejudice offer was made by the defendant, and that the Notice of Change of Solicitor and Notice of Intention to Proceed were filed.

[18] Having set out a chronology of the steps taken in the proceeding. Mr. Kimball went on to state:

> 10. When the claim was initially advanced by Howard Crosby, contact information for Patrick O'Neill, the stock broker who had represented the Defendant throughout, was requested but not provided. It now appears that Mr. Parish had contact information for Mr. O'Neill and made contact with him but at no point was this information provided to the Plaintiffs. The Defendant had an obligation to provide this long sought contact information to the Plaintiffs.
>
> ***
>
> 12. It now appears that at the time the Defendant was corresponding with Mr. Crosby (and prior to Mr. Parish's retainer), the Defendant was aware of wrongdoing. The List of Documents ultimately provided by the Defendant includes the employment file for Patrick O'Neill. Those documents indicate that Mr. O'Neill was being investigated by the IDA and was under active supervision by the Defendant during the time he was acting for the Plaintiffs. Indeed the records show that the Defendant was concerned about Mr. O'Neill's trading activities in relation to at least some of the Plaintiffs' accounts. A Uniform Termination Notice appearing at page 918 of the Defendant's list of Documents appended as Exhibit "B" indicates knowledge of wrongdoing on the part of the Defendant. None of this information was ever brought to the attention of this Plaintiff and I am advised never brought to the attention of any other Plaintiffs.

> One concern highlighted in the file was the heavy trading in specific securities that was occurring or had occurred in certain clients' accounts including the Plaintiffs' accounts.

[19] These are the paragraphs impugned by the applicant, whose submission is that they should be struck on the basis of irrelevance, argument, improper hearsay, and taking the form of a summation or plea. The applicant takes the position that these paragraphs do not contain material relevant to the factors to be considered on an application to dismiss for want of prosecution. The respondents maintain that the two paragraphs do relate to the elements of the main application.

[20] The applicant argues that the entirety of paragraph 10 is irrelevant to the application to dismiss for want of prosecution. Although it may have relevance to the issues at trial, it is submitted, none of the averments in para. 10 have relevance to the current application. The respondents claim that paragraph 10 addresses the issue of whether the defendant suffered prejudice on account of delay. They submit that Mr. O'Neill was extremely important to their claim and that if this information had been provided to them, there could have been a more pressing approach to the litigation, including proceeding with discovery after peladings closed in 2004.

[21] The respondents argue that Mr. Kimball, in drafting the affidavit, was reviewing his file in the context of being counsel. It is my view that Mr. Kimball was not a solicitor on this file. He is a plaintiff and I assess his affidavit in that context. I will deal with each sentence of paragraph 10:

> *When the claim was initially advanced by Howard Crosby, contact information for Patrick O'Neill, the stock broker who had represented the Defendant throughout, was requested but not provided*

[22] I am not prepared to rule at this time that this statement is irrelevant. It may be relevant depending on the nature of the argument. However, Mr. Kimball's source of knowledge is not identified, and there is no indication that he believes that source to be true. This passage is consequently struck.

> *It now appears that Mr. Parish had contact information for Mr. O'Neill and made contact with him but at no point was this information provided to the Plaintiffs.*

[23] As with the first sentence, this statement does not disclose or reveal the source of Mr. Kimball's knowledge. The respondents submit that the source of knowledge is Mr. Kimball's personal knowledge, adding that the same information appears in Mr. Parish's affidavit of October 23, 2008. None of this is apparent from the phrase "it now appears." Neither the source of the information nor the

basis for information and belief are found in this sentence, other than to the extent that such information was not provided to Mr. Kimball.

> *The Defendant had an obligation to provide this long sought contact information to the Plaintiffs.*

[24] This is legal argument and should be contained within the context of a legal memorandum. This portion of the paragraph is to be struck.

[25] Paragraph 12 relates to the plaintiffs' dealings with the defendants, both prior to and after the retainer of Mr. Parish, the defendant's counsel. The applicant submits that paragraph 12, too, is irrelevant to the issues on the dismissal application. The first three sentences are as follows:

> *It now appears that at the time the Defendant was corresponding with Mr. Crosby (and prior to Mr. Parish's retainer), the Defendant was aware of wrongdoing. The List of Documents ultimately provided by the Defendant includes the employment file for Patrick O'Neill. Those documents indicate that Mr. O'Neill was being investigated by the IDA and was under active supervision by the Defendant during the time he was acting for the Plaintiffs.*

[26] On its own, the first sentence of paragraph 12 would appear to be a statement that should be struck. However, while not agreeing that it is conclusory, read in the context of the next two sentences, it appears to be an observation that

Mr. Kimball could make upon reviewing the list of documents, and specifically the employment file of Mr. O'Neill. I do not necessarily agree that the statement is reliable or credible, but Mr. Kimball could be cross-examined on it. However, the last portion of the last sentence, to the effect that Mr. O'Neill was under active supervision by the defendants during the time he was acting for the plaintiffs, is not supported. Unless Mr. Kimball can point to a source of information which he believes to be true, that portion of this sentence must be struck.

> *Indeed the records show that the Defendant was concerned about Mr. O'Neill's trading activities in relation to at least some of the Plaintiffs' accounts.*

[27] The above portion of the paragraph provides no source of information and belief and must be struck from the affidavit.

> *A Uniform Termination Notice appearing at page 918 of the Defendant's list of Documents appended as Exhibit "B" indicates knowledge of wrongdoing on the part of the Defendant.*

[28] The applicant says this is a point for trial, not a motion for dismissal, arguing that it is not relevant. The respondent submits that it is relevant to the issue of prejudice with respect to what the applicant knew of Mr. O'Neill's trading activities. My concern is not with relevance, but with the fact that Mr. Kimball is

alleging that this form, on its face, speaks of wrongdoing. That is, in my opinion, more argument than fact and this sentence should be struck for that reason. While the notice indicates, among other things, that the employee has been the subject of "internal discipline or restrictions for violation of regulatory requirements," whether this constitutes "wrongdoing," in the phrasing of the affidavit, remains a matter of argument, pleading or summation. At best it is an indication of Mr. Kimball's opinion of the significance of the notice. In any event, it is more argument than evidence should not be in the affidavit.

> *None of this information was ever brought to the attention of this Plaintiff and I am advised never brought to the attention of any other Plaintiffs.*

[29] This sentence is in part appropriate, but where it speaks of the other plaintiffs, then there is no source of information and belief.

> *One concern highlighted in the file was the heavy trading in specific securities that was occurring or had occurred in certain clients' accounts including the Plaintiffs' accounts.*

[30] In the last sentence there is no identification of the source of the information, no support for the statement that the so-called trading was heavy and no source for the statement that the trading occurred in the plaintiffs accounts. Without

identifying the source and indicating whether Mr. Kimball believes the information to be true, the statements must be struck from the affidavit. Furthermore, this statement is conclusory and is argument.

[31] The respondents submit that Mr. Kimball merely "reviewed the production from the Defendant and summarized his observations," in order to demonstrate that there is contemporaneous documentary evidence that will be available to witnesses, in answer to the applicant's claim on the dismissal application that the passage of time has caused prejudice on account of fading memories of potential witnesses. I do not accept this characterization of the relevant portions of the affidavit. The passages in question amount to drawing conclusions from the contents of the documents, in the nature of a "summation or plea." The interpretation of the documentary evidence is not a matter for an affidavit.

[32] Also relevant to the issue of prejudice, the respondents submit, is the question of the applicant's knowledge of the whereabouts of Mr. O'Neill, and the failure to supply this information to the respondents. The respondents take the view that had they had this information at an earlier stage of the proceeding, they could have proceeded more quickly.

Conclusion

[33] I am satisfied that substantial portions of the affidavit fail to meet the *Waverley* standard in their current form. The appropriate remedy, I believe, is a direction that the sentences for which the sole deficiency is the failure to identify the source may be modified so as to comply with *Waverley*, unless otherwise indicated in the decision. The other defective passages – such as passages of legal argument or speculation – shall be struck in their entirety.

[34] Costs of this motion shall be in the cause.